

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DEZMAIGHNE YHARSON MCCLAIN,

Defendant and Appellant.

C069630

(Super. Ct. No. 11F01414)

A jury convicted defendant Dezmaighne Yharson McClain of second degree robbery and assault with a deadly weapon or by means of force likely to cause great bodily injury. The jury also found, as to each count, that defendant inflicted great bodily injury. The trial court sentenced him to eight years in state prison.

Defendant now contends (1) the trial court prejudicially erred in admitting evidence of defendant's gang affiliation, and (2) the evidence is insufficient to support

the great bodily injury enhancements. Disagreeing with defendant's contentions, we will affirm the judgment.

BACKGROUND

Andre Allen was walking from a parking lot when he saw three males, including defendant, in a white Lexus. Allen was wearing a red shirt and red and white Nike Jordan shoes, but he was not a gang member. Defendant and another male got out of the car, called Allen a "slob" several times and pushed Allen to the ground. "Slob" is a derogatory term used by Crip street gangs in referring to Blood gang members.

Allen got up and started running, but the assailants caught up to him. Defendant and his companions hit and kicked Allen until he lost consciousness.

Rachel Chavez was driving by and witnessed the assault on Allen. Chavez saw the attackers repeatedly hit and kick Allen as he lay on the ground. She also saw them go through Allen's pockets and steal his shoes.

Deputy Charles Esty was driving in the area when he saw people in "frantic movement" around a white Lexus. As Deputy Esty approached, a member of the group looked in his direction and got into the white Lexus while two others ran. Chavez flagged down Deputy Esty, pointed in the direction that the two individuals ran, and said, "Those are the guys that beat him."

Deputy Esty saw that Allen was bleeding from the head and was slipping in and out of consciousness. Allen could not identify himself, his location, or the date and time. Allen was taken by ambulance to a hospital.

At trial, Chavez was less certain that defendant was one of the assailants, saying it "could have been" him, and that her identification of defendant at the scene had been based on the clothing he was wearing. Deputy Esty and four other officers testified that defendant was a validated Crip gang member.

A jury convicted defendant of second degree robbery (Pen. Code, §§ 211, 212.5 -- count one)¹ and assault with a deadly weapon or by means of force likely to cause great bodily injury (§ 245, subd. (a)(1) -- count two). As to each count, the jury found defendant inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court sentenced defendant to eight years in state prison.

DISCUSSION

I

Defendant contends the trial court erred in admitting evidence of his gang affiliation, because the evidence was irrelevant and it should have been excluded under Evidence Code section 352. We disagree.

Evidence of defendant's gang affiliation was relevant to the motive, and hence the identity, of the assailants. Evidence is relevant if it tends to resolve a material issue in the case (Evid. Code, § 210), and defendant's identity as one of Allen's assailants was the primary issue in this case. "[E]vidence of motive to commit an offense is evidence of the identity of the offender." (*People v. Daniels* (1971) 16 Cal.App.3d 36, 46.) The People's theory was that defendant and his cohorts attacked Allen because they were members of the Crips gang, and they believed Allen was a member of the rival Blood gang. Thus, evidence of defendant's gang affiliation was relevant to a material issue in the case.

In addition, the trial court did not abuse its discretion under Evidence Code section 352. "Although evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged -- and thus should be carefully scrutinized by trial courts -- such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect." (*People v. Carter* (2003)

¹ Undesignated statutory references are to the Penal Code.

30 Cal.4th 1166, 1194.) “ ‘The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court’s decision exceeds the bounds of reason. . . .’ ” (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.)

As we have explained, the evidence of defendant’s gang affiliation was highly probative regarding motive. And the possibility of undue prejudice was reduced because the trial court instructed the jury pursuant to CALCRIM No. 1403: “You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant had a motive to commit the crimes charged. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by the expert witness in reaching his opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude that from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.”

On this record, we conclude the trial court did not abuse its discretion in admitting the challenged evidence.

II

Defendant also contends the evidence is insufficient to support the great bodily injury enhancements. Again we disagree.

“ ‘The standard of appellate review for determining the sufficiency of the evidence is settled. “ ‘On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence’ ” ’ ” (*People v. Howard* (2010) 51 Cal.4th 15, 33.) “Under the substantial evidence rule, we must presume in support of the judgment the existence of every fact that the trier of fact could reasonably have deduced from the evidence. [Citation.] Thus, if the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the

circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment.” (*People v. Medina* (2009) 46 Cal.4th 913, 924, fn. 2.)

The trial court instructed the jury pursuant to CALCRIM No. 3160, which defines great bodily injury as “significant or substantial physical injury” that is “greater than minor or moderate harm.” Defendant acknowledges the evidence that the attack caused Allen to bleed from his head and slip in and out of consciousness. But defendant argues such evidence was insufficient to sustain the great bodily injury finding because there was no additional testimony as to any treatment Allen received at the hospital, how long he was in the hospital, any diagnosis or medications he received or how long his injuries took to heal.

The argument is not persuasive. Loss of consciousness constitutes serious bodily injury (§ 243, subds. (d), (f)(4)), and serious bodily injury is “ ‘essentially equivalent’ ” to great bodily injury as used in section 12022.7. (*People v. Wade* (2012) 204 Cal.App.4th 1142, 1149-1150, citing *People v. Burroughs* (1984) 35 Cal.3d, 824, 831, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) In addition, there is evidence that Allen was unable to identify where he was, who he was, or what day it was. From such evidence a reasonable trier of fact could find that defendant inflicted great bodily injury.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

RAYE, P. J.

MURRAY, J.